

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASHLEY LYNN KREISER,

Defendant-Appellant.

UNPUBLISHED

May 27, 2014

No. 311560

Chippewa Circuit Court

LC No. 10-000457-FH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

On remand from the Supreme Court for consideration as on leave granted, see *People v Kreiser*, 494 Mich 854; 830 NW2d 762 (2013), defendant Ashley Lynn Kreiser appeals the trial court's sentence stemming from her plea-based conviction of two counts of manslaughter with a motor vehicle, MCL 750.321. The trial court departed upward from the recommended minimum guidelines range of 43 to 86 months by 10 months, imposing concurrent sentences of 8 years (96 months) to 15 years' imprisonment for each count. We affirm.

Defendant's convictions arise out of a fatal accident in which, while driving in an automobile with her boyfriend, defendant crossed the centerline and struck and killed David Strickland and Lisa Aikens, a father and daughter who were riding together on a motorcycle. Defendant had not slept for approximately 36 hours before the accident and had also consumed marijuana and benzodiazepine.¹ While driving on Lakeshore Drive in Bay Mills Township, she became distracted when trying to see what her boyfriend was writing and to whom when sending text messages on his cellular telephone. After crossing the centerline, defendant struck Strickland and Aikens's motorcycle. Strickland and Aikens suffered severe injuries and died shortly after the crash.

¹ When interviewed by a sergeant from the Chippewa County Sheriff's Department a day after the accident, defendant admitted that she had been drinking earlier in the day and took some valium a couple of days earlier. She denied that she had smoked marijuana in the past two or three days, but TCH (marijuana) was detected in a blood sample drawn from her after the accident and a marijuana grinder with marijuana was found in her purse.

Following defendant's guilty plea to two counts of manslaughter, the sentencing court departed upward, as noted above. Defendant challenges the sentencing court's decision to depart from the recommended minimum guidelines range. A sentencing court may depart from the recommended minimum guidelines range if it articulates a substantial and compelling reason for doing so. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Factors supporting the departure must justify both the departure itself and the particular departure made, must keenly and irresistibly grab the court's attention, and must be of considerable worth. *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008). The sentencing court may not base its decision to depart on a characteristic already taken into account by the guidelines unless the court determines that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Smith*, 482 Mich at 300. The factors must be objective and verifiable, meaning that the factors are actions or occurrences external to the mind of the judge and are capable of being confirmed. *Smith*, 482 Mich at 301. The sentencing court may draw inferences from objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). Finally, the sentencing court "must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been." *Smith*, 482 Mich at 304.

This Court reviews a sentencing court's determination regarding the existence of a particular sentencing factor for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). We review the determination that a factor is objective and verifiable as a matter of law. *Id.* We review for an abuse of discretion the sentencing court's determination that the objective and verifiable factors present in a case constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id.* In ascertaining whether the departure was proper, this Court defers to the sentencing court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

The sentencing court provided the following explanation for its decision to depart upward from the recommended minimum guidelines range:

First of all, [the offense] has impacted the family severely. These are deaths, but also deaths involving two deaths [sic] []. They lost a father, brother, sister, daughter. The impact is much more severe than it would be if somebody was driving drunk and just hitting a person. It's all bad, but this is a more significant impact on this family.

And secondly, these people survived. They survived for a period of time knowing they [were] dying. Mr. Strickland lost a leg. He knew he was dying. He communicated. So for one hour, I mean, he had to go through agony on this sort of terrible event and he knew that and so that compels me to say it should be higher than the guideline rang[e] because these people didn't die instantly. They knew they were dying and subsequently they did die. The Court feels under this set of circumstances it is proper to exceed the guidelines for several months. It isn't that much, but I have exceeded the guideline[s] to sentence 8 to 15 years.

Defendant first argues that the sentencing court erred in relying on the death of the victims to justify its departure because she received 50 points under offense variable 3, which permits the sentencing court to score points for physical injury to the victim. See MCL 777.33.

However, the sentencing court's focus was not simply on the fact that the victims died, but on the fact that *two victims from the same family* died. As the sentencing court noted, the accident had a particularly significant impact on the victims' family members caused by losing two loved ones, and it impacted the family dynamics. This is perhaps most poignantly illustrated by the fact that the accident caused Aikens's two children to have to move to Canada to live with their father, who was estranged from the Strickland family. As such, Aiken's mother lost her daughter and her husband (Strickland), and she would no longer be able to see her grandchildren. The guidelines do not always take into consideration the ways in which an offense affects familial relationships and family dynamics. See *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001). See also *People v Anderson*, 298 Mich App 178, 189; 825 NW2d 678 (2012) (explaining that the guidelines sometimes fail to account for unique psychological injuries). Therefore, the sentencing court properly considered objective facts that were not accounted for in the guidelines and did not abuse its discretion when it determined that the deaths of two family members from a single accident was a substantial and compelling reason to depart from the recommended minimum guidelines range.

Next, defendant argues that the sentencing court improperly engaged in speculation about the thoughts that went through the victims' minds after the accident and that it could not have relied on this factor in departing from the guidelines. Although the sentencing court discussed the victims' thoughts, it indicated that it intended to exceed the guidelines "because these people didn't die instantly." That fact is objective and verifiable, and it is noted in the presentence investigation report (PSIR). Indeed, the accident took place at 8:25 p.m., and Aikens and Strickland died at the hospital at 9:29 and 9:34 p.m., respectively. The PSIR indicates that at the scene, Aikens was lying face up with obvious broken legs and blood coming from her mouth. Her eyes and mouth were open. She did not respond to emergency responders, but she had a weak pulse. Strickland was conscious after the accident. His eyes were open and he was moving his head. Although initially unable to respond, he was eventually able to make a groan. The accident had sheared off his leg from the knee down. A sentencing court is not precluded from drawing inferences from objective evidence. *Petri*, 279 Mich App at 422. Given that both victims survived for approximately one hour after a grisly accident, that Strickland lost his leg below the knee and was conscious and able to move his head and groan, the victims' pain, suffering, and prolonged deaths were appropriately inferred from the evidence and were not accounted for in the guidelines. See *Anderson*, 298 Mich App at 187-188 (holding that guidelines do not always adequately account for the severe pain suffered by a victim). The sentencing court did not abuse its discretion by relying on this factor as a reason to depart from the guidelines.²

² In reaching this conclusion, we note that the sentencing court did not clearly articulate how the guidelines did not adequately account for the factors cited to justify departure from the recommended minimum guidelines range. However, beyond one brief, conclusory sentence, defendant's brief does not raise this issue, and "[w]e generally do not address the merits of unbriefed issues." *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993). Furthermore, as discussed above, it is clear that the guidelines did not adequately account for the factors cited by the sentencing court.

Defendant further contends that, even if this Court concludes that the reasons were substantial and compelling, the extent of the departure was not proportionate. Before announcing its decision to depart from the recommended minimum guidelines range, the sentencing court discussed possible sentence lengths while addressing the gravity of the offense. Next, the sentencing court calculated that defendant's guidelines were 43 to 86 months and sentenced defendant to a minimum term of 96 months (8 years). Thus, the sentencing court departed by a modest 10 months. Given the sentencing court's discussion of the appropriateness of different sentences and the gravity of defendant's offense, we conclude that the court provided an adequate justification for why its decision to depart from the recommended minimum guidelines range produced a more proportionate sentence. See *Smith*, 482 Mich at 304-305. Further, given that defendant could have received two consecutive 86-month sentences, see MCL 769.36(1)(b), the fact that defendant received two concurrent sentences that exceeded the guidelines by only 10 months does not seem disproportionate.³ Accordingly, we conclude that the sentencing court did not err in departing from the recommended minimum guidelines range in this case.

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

³ Although the plea agreement was for concurrent sentences of 5 to 15 years, because the trial court indicated at sentencing that it could not abide by the agreement and defendant continued with sentencing, the agreement for concurrent sentences was no longer binding and the trial court could have given defendant consecutive sentences.